

NATOA not only wants to limit external cost treatment to direct costs with a stated dollar amount but further require that such costs be incurred "to satisfy franchise requirements imposed by a franchise authority."⁴⁶ NATOA erroneously believes that there is a category of services that cable operators "voluntarily agree to provide" but which are nonetheless included in a franchise agreement. A requirement contained in a franchise agreement and enforceable by a franchise authority can hardly be said to be "voluntary" since a cable operator cannot unilaterally decide to no longer furnish the service. Provisions in a franchise agreement, like those in other bilateral contracts, are "voluntary" only in the sense that the operator can refuse to offer or accept them and take the consequences. But in that sense all provisions of a franchise agreement are voluntary. To make volition the test of whether a franchise cost could be passed-through would create an exception that would swallow the rule.

C. Franchise-Related External Costs Should Be Passed-Through In Accordance With Generally Accepted Accounting Principles.

There is no a priori reason for requiring a cable operator to pass-through franchise-related external costs ratably over the term of the franchise agreement. NATOA's insistence on such treatment of franchise-related external costs⁴⁷ paints with too broad a brush and should be rejected by the Commission. Different franchise-related external costs have different useful lives (some longer and some shorter than the franchise term) and should be accounted for differently. Each such cost should be passed-through in accordance with

⁴⁶Id. (emphasis in original).

⁴⁷NATOA at 4-5.

generally accepted accounting principles.⁴⁸ Such treatment would prevent the overestimation of such costs feared by NATOA, while providing consistent and fair external cost recovery to cable operators.

D. The Commission Correctly Directed Cable Operators To Allocate PEG Costs To The Basic Service Tier.

The Commission's cost allocation rules simply and correctly direct cable operators to allocate costs for PEG channels carried on the basic service tier to that tier.⁴⁹ As a matter of federal law, PEG channels must be placed on the basic tier, and their costs are thus

VI. THE THIRTY-PERCENT PENETRATION STANDARD SHOULD BE MEASURED ON A FRANCHISE-AREA BASIS.

Time Warner opposes those petitions for reconsideration that ask the Commission to revisit Section 76.905(b)(1) of its rules, under which a cable operator will be deemed to be subject to effective competition when "[f]ewer than 30 percent of the households in its franchise area subscribe" to the operator's cable service.⁵² Specifically, several local regulatory interests have argued that the Commission should limit the application of the 30 percent penetration test to only that portion of the franchise area in which the cable operator's service is actually (and presently) available.⁵³ Time Warner submits that such a limitation would contradict the express language of the 1992 Cable Act and, thus, must be rejected.

Section 76.905(b)(1) essentially reiterates the language of Section 623(l)(1)(A) of the 1992 Cable Act.⁵⁴ In demanding that the Commission construe the term "franchise area" to refer not to the franchise area as a whole, but only to that portion currently being served, the petitioners argue, in effect, that Congress intended for the same term -- "franchise area" -- to have different meanings within a single provision of the Act. For example, the term "franchise area" also appears in Section 623(l)(1)(B) and (C).⁵⁵ Yet, petitioners do not seek to have the meaning of the term "franchise area" as used in these provisions limited to the

⁵²47 C.F.R. § 76.905(b)(1) (emphasis added).

⁵³Petition of Michigan C-TEC Communities ("Michigan Communities") at 3 - 6; NATOA at 14 - 17; King County at 14 - 15.

⁵⁴47 U.S.C. § 543(l)(1)(A).

⁵⁵47 U.S.C. § 543(l)(B) and (C).

area actually served, nor would such an interpretation make any sense. Moreover, Congress has previously demonstrated that it knows how to refer to the households in which cable service is "available."⁵⁶ Under the circumstances, the Commission's interpretation of Section 623(b)(1)(A) is entirely appropriate and should not be disturbed.

VII. SMATV AND TVRO SERVICES SHOULD BE PRESUMED TO MEET THE "50 PERCENT OFFERED" COMPONENT OF THE HEAD-TO-HEAD COMPETITION TEST.

Both NATOA and King County seek reconsideration of certain determinations made by the Commission with respect to the application to SMATV/TVRO services of the so-called "head-to-head" competition portion of the "effective competition" standard. The "head-to-head" competition portion of the standard (codified in Section 76.905(b)(2) of the Commission's rules) deems a cable system to be subject to effective competition when at least two multichannel video programming distributors each offer service to more than 50 percent of households in the franchise area and more than 15 percent of the households subscribe to distributors other than the largest distributor. According to NATOA and King County, the Commission erred in determining that SMATV and TVRO services generally will be presumed to be "offered" to 50 percent of the franchise area for purposes of the head-to-head effective competition test. However, Time Warner submits that the Commission's judgment in this matter reflects the reality of satellite delivery technology and, thus, should not be reconsidered.

⁵⁶See 47 U.S.C. § 532(g) (provision in 1984 Cable Act authorizing Commission to consider promulgating additional leased access rules when penetration among households to which cable service is "available" reaches a certain level).

The Commission's treatment of SMATV and TVRO services recognizes that the two media use similar technologies. Both delivery systems provide service from a satellite receive dish to the subscriber's television through wireline transmission. The only difference in the two media is that TVROs typically serve a single household and SMATVs serve multiple dwelling units. Because video signals generated by space satellites for both SMATV and TVRO service can be received throughout the country, these services are technically able to be received in all areas of the country.⁵⁷ It is appropriate, therefore, for the Commission to have created a rebuttable presumption that these services are available in any community.⁵⁸

VIII. THE COMMISSION SHOULD NOT MAKE THE DEFINITION OF COMPARABLE PROGRAMMING ANY MORE RESTRICTIVE.

In its reconsideration petition, NATOA has petitioned the Commission to redefine the term "comparable programming" as used in the head-to-head effective competition test.⁵⁹ Under the Commission's rules, the programming offered by a competing multichannel video provider is deemed comparable when it consists of a minimum of twelve video channels with

⁵⁷NATOA at 19-20 objects that SMATV is not available to MDU dwellers because it is often the landlord, not the MDU dweller, that must arrange for SMATV service. However, this same situation applies to cable service; furthermore, the Commission clearly rejected this approach as it decided to count each MDU dwelling unit as an individual household. Order at ¶ 34.

⁵⁸NATOA also objects that both SMATV and TVRO services cannot be presumed to be offered in a single franchise area since either the number of single family homes or multiple dwelling units must predominate. We fail to see NATOA's point -- the presumption will apply to either SMATV or TVRO service in any given community based on housing patterns.

⁵⁹NATOA at 20-24.

at least one channel of nonbroadcast service programming.⁶⁰ NATOA asks that the Commission define programming of competitors as comparable only when the competitor provides at least 80% of the number of nonbroadcast channels offered by the cable operator. Given the presumption of comparability of programming which should follow from meeting both the penetration component of the head-to-head competition standard and the Commission's current 12 channel requirement, NATOA's approach would only encourage needless regulation in areas that are truly competitive.

As Time Warner has pointed out in previous comments in this docket, where a second multichannel video provider is offering service to 50% of the households in the franchise area and service is being provided to at least 15% of those households, it is reasonable to presume that the programming offered is of a level that consumers find comparable to cable service.⁶¹ As an additional safeguard, however, the Commission adopted the present 12 channel standard.⁶² Although Time Warner continues to believe this additional safeguard is unnecessary, it is certainly more than adequate to assure comparability.⁶³

Indeed, NATOA's definition would have the wholly inappropriate effect of precluding SMATV providers from being considered as a source of "effective competition." Using

⁶⁰47 C.F.R. § 76.905(b)(2) and (g).

⁶¹Comments of Time Warner at 11-12; Reply Comments of Time Warner at 6. See also Notice of Proposed Rulemaking in MM Docket 92-266, FCC 92-544, ¶ 9 (released December 24, 1992).

⁶²Order at ¶ 38.

⁶³NATOA suggests that the 12 channel standard revives a broadcast-based standard for effective competition. This assertion ignores the fact that the head-to-head standard is not simply a measure of broadcast signal availability, but requires the presence of a competing non-broadcast, multichannel video distributor.

NATOA's example of a 60 channel system and assuming 10 channels of broadcast programming, an alternative provider would have to offer at least 40 channels of nonbroadcast programming in order to provide "comparable" service. SMATV operators, however, have found that they can compete effectively with cable without offering such a broad array of programming.⁶⁴ As the Commission stated, a SMATV operator is a multichannel video provider that "functions much like a traditional cable operator."⁶⁵ Excluding the typical SMATV provider from consideration as a competitor to the cable operator, as NATOA would have the Commission do, would impose needless regulation on many areas that are served by competitive distributors.

IX. THE COMMISSION SHOULD NOT ALTER ITS REVOCATION

Further, NATOA requests that the Commission revise Section 76.914 of its Rules to provide that revocation will not be ordered unless the Commission determines that local implementation substantially and materially interferes with the Commission's rules or the 1992 Cable Act.⁶⁸ Time Warner objects that NATOA's proposed change would fundamentally alter the established federal/local regulatory framework of the 1992 Cable Act. The Act clearly delineates a general scheme of basic service rate regulation: the Commission establishes regulations and the local authority enforces the regulations.⁶⁹ NATOA's proposal would invite the promulgation of disparate and inconsistent regulations across the country. This would clearly violate the 1992 Cable Act's mandate for regulatory uniformity: "[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section."⁷⁰ The Commission's regulations and benchmark tables are not merely a recommended approach for local regulators who may decide to embellish on the Commission's work; the local authorities must conform precisely to these regulations or risk revocation.

X. EXISTING FRANCHISE AGREEMENTS ARE PROPERLY PREEMPTED TO THE EXTENT THEY MANDATE SERVICES ON THE BASIC TIER ABOVE THE MINIMUM STATUTORY REQUIREMENT.

NATOA and King County have asked the Commission to reconsider its determination that the statutory definition of the basic service tier contained in the 1992 Cable Act preempts provisions in franchise agreements that require additional services to be carried on the basic

⁶⁸NATOA at 28.

⁶⁹47 U.S.C. § 543(b)(1) (Commission establishes regulations); 47 U.S.C. § 543(b)(5)(A) (cable operators implement and local authorities enforce Commission rate regulations).

⁷⁰47 U.S.C. § 543(a)(1).

tier.⁷¹ In making this request, NATOA and King County rely on two principal arguments: (1) preemption conflicts with provisions of the 1984 Cable Act; and (2) preemption is not required by the 1992 Cable Act. As discussed below, these arguments are without merit. Accordingly, Time Warner urges the Commission to reject the petitioners' recommendations.

First, King County and NATOA both argue that the Commission's decision preempting non-federal basic tier requirements renders Section 625(d) of the 1984 Cable Act a nullity. This argument simply is in error. Section 625(d) was enacted to protect a cable operator's right to retier, despite franchise requirements to the contrary, not to give greater power over cable service content to franchising authorities. Thus, for example, Section 625(d) continues to protect a cable operator's right to retier all services in any community meeting the definition of effective competition under the 1992 Cable Act.

Second, NATOA and King County argue that the Commission's preemption decision should be reconsidered and reversed because preemption is not required by the 1992 Cable Act. Again, NATOA and King County are incorrect. The statutory definition of the basic service tier sets out federally mandated minimum requirements, leaving additional programming choices squarely within the sole discretion of the cable operator.⁷² If the Commission were to adopt petitioners' position and allow local franchising authorities to

⁷¹King County at 21-24; NATOA at 29-32.

⁷²See 47 U.S.C. § 543(b)(7). Specifically, each cable operator is required to provide a separately available basic service tier to which subscription is required for access to any other tier of service. At a minimum, this basic tier must include the broadcast signals distributed by the cable operator (excluding superstations), along with any public, educational, and government (PEG) access channels the system operator is required to carry. Additional video programming signals may also be included at the discretion of the cable operator.

enforce provisions requiring the inclusion of particular services on the basic tier in addition to the minimum statutory requirements, the discretion clearly granted cable operators by the statute would be negated.

Finally, the Commission noted that the 1992 Cable Act's legislative history specifically discusses Congress' intent not to preempt franchise provisions requiring or permitting carriage of PEG channels on non-basic tiers. As the Commission recognized, had Congress "not intended to preempt provisions in franchise agreements specifying the contents of the basic tier, there would have been no need for the Report language on the specific question of PEG channels."⁷³ In short, both the plain language of the 1992 Cable Act and its legislative history clearly indicate that preemption is required.

XI. THE COMMISSION SHOULD CLARIFY ITS RULES REGARDING THE PROTECTION OF PROPRIETARY INFORMATION TO MAKE CLEAR THAT STATE AND LOCAL LAWS ARE PREEMPTED TO THE EXTENT THEY ARE NOT IDENTICAL TO THE REQUIREMENTS OF SECTION 0.459.

King County and the Michigan Communities have asked the Commission to clarify whether its rules regarding the protection of proprietary information preempt state and local laws.⁷⁴ In addition, the Michigan Communities suggest that the Commission amend Section 76.938 of the Commission's rules to make it clear that state and local laws regarding the confidentiality of proprietary information are preempted to the extent they are not

⁷³Order at ¶ 161.

⁷⁴See King County at 20-21; Michigan Communities at 7-10.

identical to requirements set out in 47 C.F.R. § 0.459.⁷⁵ Time Warner agrees that the Commission should re-examine this issue, and urges the Commission to adopt the recommendation of the Michigan Communities.

Section 76.938 of the Commission's rules states: "A franchising authority may require the production of propriety information to make a rate determination and in such cases must apply procedures analogous to those set forth in § 0.459 regarding requests for confidentiality." (emphasis added.) In fact, many state and local statutes governing the disclosure of information are based on the federal Freedom of Information Act ("FOIA"). However, as the Michigan Communities point out, some state statutes contain exemptions from disclosure that differ from those found in the federal FOIA.⁷⁶ Thus, it is unclear whether a state or local statute including exemptions different than those found in the federal FOIA would be "analogous" for the purposes of Section 76.938. Resolving this issue will avoid potentially expensive and time consuming litigation.

The Commission should preempt state and local statutes to the extent they differ from the federal FOIA because absent preemption, information protected from disclosure in one jurisdiction may end up being divulged in another. Time Warner does not believe that the Commission intended to bring about this anomalous result. Moreover, imposing a single standard is supported by the 1992 Cable Act, which directs the Commission to avoid

⁷⁵Michigan Communities at 10. Decisions with respect to non-disclosure requests made pursuant to Section 0.459 are governed by the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"). Thus, state and local laws must be identical to the federal FOIA to avoid preemption.

⁷⁶Michigan Communities at 8.

regulation causing excessive administrative burdens.⁷⁷ Accordingly, Time Warner joins the Michigan Communities in requesting that the Commission address this matter by making it clear that the requirements of Section 76.398 preempt state or local laws regarding the confidentiality of proprietary information.⁷⁸

XII. THE COMMISSION CORRECTLY CONCLUDED THAT GEOGRAPHIC PRICE UNIFORMITY APPLIES ONLY TO REGULATED SERVICES WITHIN PARTICULAR REGULATED FRANCHISE AREAS.

The Commission has determined that geographic price uniformity, as required by Section 623(d) of the 1992 Cable Act,⁷⁹ applies only to regulated services within particular franchise areas.⁸⁰ In addition, for the purposes of this section, the Commission defined "geographic area" to mean "franchise area."⁸¹ In petitioning the Commission to reconsider these decisions, King County has argued that limiting the "uniformity requirement only to the franchise area, and only to franchise areas that do not face effective competition is inconsistent with the purposes of the provision and its express language."⁸² As is

⁷⁷47 U.S.C. 543(b)(2)(A).

⁷⁸Alternatively, the Michigan Communities suggest that Section 76.938 be amended to remove the reference to Section 0.459 entirely. The result of this recommendation would be to subject all non-disclosure requests to state and local law. Time Warner argues that this alternative fails to take into account the likely inconsistent results from one jurisdiction to another, nor does it address excessive and unwarranted administrative burdens. As such, this suggestion should be rejected.

⁷⁹47 U.S.C. § 543(d).

⁸⁰Order at ¶ 421.

⁸¹Id. at ¶ 422.

⁸²King County at 17.

demonstrated below, King County's position is illogical, unsupported by the language of the Act, and contrary to the Act's legislative history.

King County's desire to extend price uniformity to unregulated communities is based on the flawed assumption that a cable operator would be able to subsidize "rates in a franchise area [subject to effective competition] by charging excessive rates in a franchise area . . . where the operator does not face competition."⁸³ This argument defies logic and is at odds with the very essence of Section 623 of the 1992 Cable Act. It is well established that the underlying purpose of Section 623 is to ensure that cable operators not facing effective competition will be subject to rate regulation in order to protect subscribers from unreasonable rates. Thus, it is unclear how King County reaches the conclusion that an operator subject to regulation within a franchise area -- and thereby required to charge a "reasonable" rate -- would at the same time be able to extract monopoly profits in order to cross-subsidize a franchise area in which effective competition exists.

Furthermore, King County's position is unsupported by the plain language of the Act itself. Congress was extremely careful to set strict limits on the power to regulate cable rates.⁸⁴ For example, the Act states that "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such systems shall not be subject to regulation by the Commission or by a State or franchising authority

⁸³Id. at 16.

⁸⁴This is reflected in the very first sentence of Section 623 of the 1992 Cable Act, which states: "No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided [herein] . . . Any franchising authority may regulate rates . . . but only to the extent provided under this section." 47 U.S.C. § 543(a).

under this section."⁸⁵ In response to this clear statutory directive, King County offers only the strange opinion that it does "not believe that a uniform rate requirement constitutes rate regulation at all."⁸⁶

King County also misses the mark in taking issue with the Commission's decision regarding the area in which price uniformity is applicable. Without offering any support for its position, King County states that the price uniformity requirement should not be limited to an operator's franchise area. In so doing, King County ignores the reasoned approach taken by the Commission in defining "geographic area." The Commission recognized that the legislative history of the Act shows a clear intent by Congress to impose rate uniformity on a franchise-area basis.⁸⁷ Moreover, the Commission correctly noted that Section 623(e) of the Act affords local franchising authorities regulatory oversight to prohibit price discrimination. Thus, adopting a uniform rate structure requirement for an area larger than a franchise area, as suggested by King County, would frustrate the ability of a local franchise

⁸⁵47 U.S.C. § 543(a)(2) (emphasis added). Furthermore, the Commission acknowledged that the "general thrust of the rate regulation provisions of the Act is that as the markets involved become more fully competitive, regulation specific to the cable industry may be reduced and general provisions of the law relating to anticompetitive conduct more heavily relied on." Order at ¶ 421. As such, it would be inconsistent with the Act to impose price uniformity in communities which meet the statutory "effective competition" test.

⁸⁶King County at 17, fn. 17.

⁸⁷"[C]able operators must offer uniform rates throughout the geographic area in which they provide cable service. This provision is intended to prevent cable operators from having different rate structures in different parts of one cable franchise. This provision is also intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor." Order at ¶ 422, fn. 1051, quoting S. Rep. No. 92, 102d Cong., 1st Sess. at 76 (1991).

authority to exercise its power to prohibit discrimination. In sum, King County's recommendations are without merit and should be denied.

XIII. THE COMMISSION SHOULD REJECT FURTHER CATEGORIZATION OF LEASED ACCESS TIME AND REJECT CERTAIN PETITIONERS' SUGGESTIONS WHICH DISTANCE LEASED ACCESS USE FURTHER FROM CONGRESS' ORIGINAL GOALS FOR LEASED ACCESS.

1. Categorization.

As set out in Time Warner's Petition for Reconsideration, the Commission should abandon its attempt to differentiate leased access programming by category.⁸⁸ Although this rate differentiation through categorization is itself not authorized by the 1992 Cable Act and is contrary to Congress' goal of not adversely affecting the financial condition of cable operators, SUR and others⁸⁹ urge the Commission to create even more categories in an attempt to force cable operators to give priority to minority and educational programming as against other types of programming⁹⁰ and achieve even lower maximum rates for "favored" classes of programmers such as low power station operators which do not qualify for must carry treatment.⁹¹ These attempts to create additional categories based on the nature of the speaker or the content of its speech are no less content based and subject to strict scrutiny than is the entire leased access scheme. Such content-based regulation cannot survive strict scrutiny. Moreover, such categorization is inconsistent with the Congressional admonition

⁸⁸Petition for Reconsideration of Time Warner at 34-35.

⁸⁹Petition for Reconsideration of SUR Corporation at 11-13 ("SUR"); Petition for Reconsideration of Center for Media Education ("CME") *et al.* at 6-8; Comments of Engle Broadcasting at 5-6 ("Engle").

⁹⁰SUR at 15.

⁹¹Engle at 6.

that cable operators should not exercise editorial discretion on leased access channels.⁹² Indeed, with respect to low power television stations such as Engle and ValueVision, Congress put LPTVs in a disfavored position in the must carry context with no indication that LPTVs should receive special consideration in the leased access area.⁹³

2. The Implicit Fee Model.

If the Commission nonetheless determines to keep the rules keyed to implicit fees and three categories of programming, several of the positions urged on reconsideration must be rejected. Where a cable operator already carries a category of leased access programming, unless shown otherwise, the rates charged should be deemed the product of arm's length, market-driven negotiations. Such rates are entitled to a presumption of reasonableness.⁹⁴ At the very least, where an operator has no non-leased access programmer in a category to use to calculate an implicit fee, the operator should be permitted to employ the highest explicit fee of any unaffiliated leased access programmer as the maximum rate. Such a standard is objective if the programmer is unaffiliated with the operator, and it is far less onerous and more practical than requiring the operator to search for a system with "the same" number of subscribers, total channels and satellite channels.⁹⁵ In all events, Time Warner agrees with the petitioners advocating that the Commission provide a mechanism

⁹²See 47 U.S.C. § 532(c)(2).

⁹³See 47 U.S.C. § 533.

⁹⁴See 47 U.S.C. § 532(f).

⁹⁵Order at ¶ 519 n.1313.

whereby operators may seek to demonstrate, on a case-by-case basis, the validity of fees higher than those generated by the highest implicit fee formula.⁹⁶

Several petitioners have asserted that once the implicit fee per subscriber per month is calculated, the maximum rate should be determined by multiplying that number by those subscribers actually subscribing to the premium channel or the target audience in the "other" category rather than the potential audience supplied by the system.⁹⁷ This interpretation is nowhere apparent in the language of the regulations. In fact, the alternative offered by these petitions is utterly inconsistent with Congress' warning that cable operators be allowed to establish the price, terms and conditions for the use of leased access channels so as not to "adversely affect the operation, financial condition or market development" of cable systems.⁹⁸ Services advocating this approach typically have very low penetration rates that would result in extremely low rates.⁹⁹ Indeed, for some cable systems, this formula could

⁹⁶Although Time Warner agrees with ValueVision's premise that looking to the explicit fee currently charged to home shopping programmers makes sense, ValueVision's suggestion that the Commission apply a single rate for all home shopping programmers nationwide is inequitable. Petition for Reconsideration of ValueVision International, Inc. at 3 ("ValueVision"). Because current agreements between home shopping networks and operators were negotiated in the marketplace, they are not uniform -- any attempt to generalize their terms necessarily would be flawed. In fact, many such agreements include payments for channel capacity in excess of a percentage commission on net sales. Moreover, as discussed below, a national standard for leased access rates is inconsistent with Congressional intent.

⁹⁷See, e.g., SUR at 6-7; Engle at 6.

⁹⁸47 U.S.C. § 532(c)(1).

⁹⁹Time Warner's experience in New York City has been that ethnic and foreign leased access programming services are purchased at best by only a few thousand subscribers. Under SUR's formulation, as a premium channel category programmer, it could lease an entire channel on Time Warner's Southern Manhattan system in New York City (which
(continued...)

produce rates so low as to be confiscatory. Therefore, the Commission's example in footnote 1312 of the Order should make more clear that the implicit fee per subscriber is to be multiplied by all subscribers on the system. In the Commission's example, if the system in question had 20,000 subscribers, the maximum leased access fee for a premium channel would be \$30,000 per month. The number of subscribers that actually purchase the service should be irrelevant since that is a matter governed by how well the programmer programs and markets its services.

One programmer has argued that the current implicit fee equation results in unduly high rates, and that the maximum rate will become the de facto minimum rate.¹⁰⁰ Although superficially appealing, this argument carries little weight. First, the implicit fee methodology already understates the highest implicit fee because it calculates the average value of a channel across the entire system, not the actual value to a subscriber. Second, the Commission clearly has determined that even the "maximum" rate successfully strikes a balance between the Acts' objectives of promoting diversity and ensuring adequate compensation for cable operators.¹⁰¹ Finally, unless demand almost meets or exceeds capacity, it is unlikely that most cable operators will continue to insist on the maximum rate and forego the opportunity to sell substantial amounts of unused time.

⁹⁹(...continued)

provides access to some 260,000 subscribers) for a few thousand dollars a month or less. This is approximately 90 percent lower than what Showtime's implicit fee under the Commission's formula would be for a channel on that same system.

¹⁰⁰CME at 5.

¹⁰¹Order at ¶ 515-16, 519. "The diversity envisioned by [Section 612] is to be brought about in a manner which is not inconsistent with the growth and development of cable systems." H.R. Rep. No. 934, 98th Cong., 2d Sess. 48 (1984).

Some petitioners have suggested that the Commission impose a national maximum fee standard -- e.g., \$.30 per subscriber per month. An across-the-board maximum, by definition, fails to account for particular characteristics of individual systems, and may cause undue hardships on certain systems. Moreover, standardization of rates is inconsistent with Congress' intent to permit price discrimination -- which it believed would enhance diversity.¹⁰²

3. Rates For Part-Time Leases.

The Commission's pro rata calculation for less-than-monthly rates fails to take into account the additional administrative and technical costs associated with part-time leases.¹⁰³ The current scheme will render part-time leases financially burdensome for the operator with a concomitant negative effect on the quality of service.

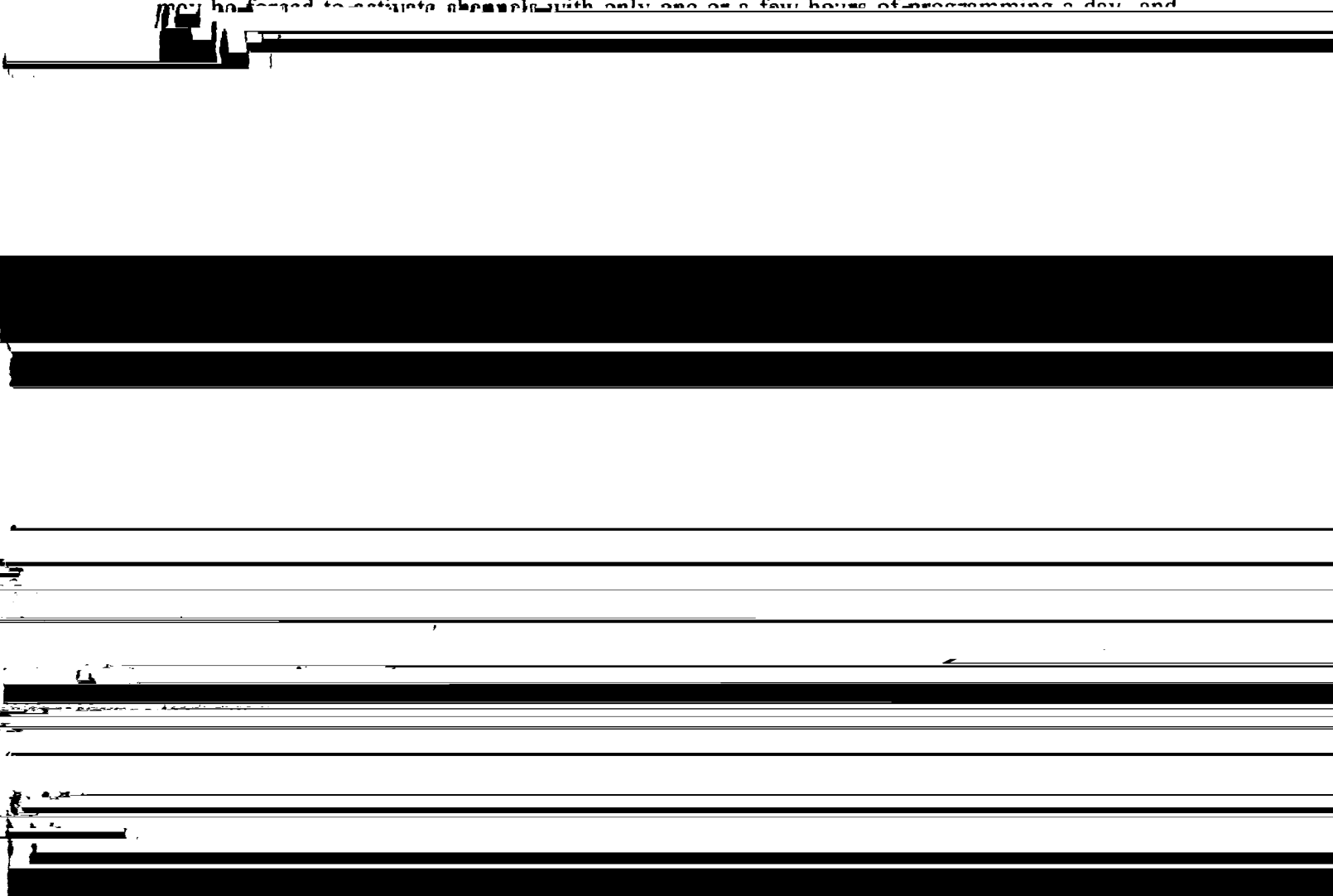
In addition, the pro rata calculation does not adequately account for the prevalence of leased access users desiring to lease less than a full channel -- often just several hours a week. Certain petitioners recognize this deficiency, but offer interpretations that fail to account for differences in the value of various hours of the day, and even among days within the week. Simple proration causes peak time to be underpriced, while off peak time is

¹⁰²Indeed, Congress recognized that non-discriminatory access requirements "could well undermine diversity goals . . ." H.R. Rep. No. 934 at 51. ValueVision's "first-come non-discriminatory" approach to leased access should be rejected on the same basis. ValueVision at 13. A first come, first served system is already available on most PEG channels. Contrary to CME's argument, most subscribers are served by systems offering PEG channels and CME offers no evidence, and it seems unsupportable, that most non-profit programmers will not qualify to use public access channels. CME at 12-13.

¹⁰³For example, a significant number of leased access programmers use videotape instead of satellite transmission to deliver their programming to the operator, which creates additional labor and equipment costs for the operator.

overpriced at the maximum rate. Operators unable to charge remunerative rates for peak hours will be reluctant to lower rates for off-peak hours. The result will threaten diversity by fostering off-peak prices beyond the reach of less mainstream programmers who might otherwise have been able to have a voice there. To avoid this problem, Time Warner suggests that as long as an operator's revenues from a channel do not exceed the total monthly maximum implicit fees per subscriber, the operator's rates should be deemed to be within the maximum for that channel.

Finally, as pointed out by certain petitioners, the Commission needs to make clear that an operator may refuse to open a new channel for part-time leased access so long as time remains available on a channel already designated for leased access. Otherwise, operators may be forced to activate channels with only one or a few hours of programming a day, and



4. Other Issues.

On the subject of billing and collection, Time Warner concurs with other petitioners who point out that the 1992 Cable Act only authorizes rate regulation for billing and collection services and does not authorize the Commission to mandate that operators provide such services in the context of leased access. Therefore, the Commission should refrain from imposing that burden, and in all events should make it optional where suitable third party suppliers are available.

Finally, CME's argument that the Commission should change the dispute resolution standards of proof is without basis.¹⁰⁷ Section 612(f) of the 1984 Cable Act expressly establishes the presumption that the operator has acted reasonably,¹⁰⁸ and the Commission correctly stated that "there is no indication that Congress intended to change the burden of proof set forth in [this] Section."¹⁰⁹

¹⁰⁷CME at 17-21.


¹⁰⁸47 U.S.C. § 532(f).

¹⁰⁹Order at ¶ 535.

CONCLUSION


Nearly fifty petitions for reconsideration have been filed in response to the Commission's Order implementing the rate regulation provisions of the 1992 Cable Act. Most of the petitions have been filed on behalf of cable operators and programmers and point out significant flaws in the Order that the Commission should redress. Several other petitions, however, urge modifications that would exacerbate rather than correct the problems in the Order. As discussed above, these petitions (filed principally by municipal entities and leased access programmers) are without merit and should be denied.

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CERTIFICATE OF SERVICE

I, Robert S. Childress, do hereby certify that true copies of the foregoing
"OPPOSITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P. TO
PETITIONS FOR RECONSIDERATION" were sent this 21st day of July, 1993, by first
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